MARK A. BYRNE (CA SB #116657)
markbyrne@byrnenixon.com
BYRNE & NIXON LLP
800 West Sixth Street, Suite 430
Los Angeles, California 90017
Tel: (213) 620-8003
Fax: (213) 620-8012

SEAN F. O'SHEA (admitted pro hac vice)
soshea@osheapartners.com
O'Shea Partners LLP
90 Park Avenue, 20th Floor
New York, NY 10016
Tel: (212) 682-4426
Fax: (212) 682.4437

Attorney for Intervenors and Third Party Plaintiffs Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK ZUCKERBERG, Plaintiffs, vs. CONNECTU, INC. (formerly known as CONNECTU, LLC), PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, and WAYNE CHANG, Defendants, and CAMERON WINKLEVOSS, TYLER WINKLEVOSS and DIVYA NARENDRA, Intervenors and Third Party Plaintiffs.	CASE NO. 5:07-CV-01389-JW **THIRD PARTY COMPLAINT AGAINST THE FACEBOOK, INC. AND MARK ZUCKERBERG** **REDACTED**

Dockets.Justia.com

Intervenors and Third-Party Plaintiffs CAMERON WINKLEVOSS, TYLER WINKLEVOSS and DIVYA NARENDRA ("Intervenors"), by and through their undersigned attorneys, as and for their Third-Party Complaint against Plaintiffs, THE FACEBOOK, INC. and MARK ZUCKERBERG ("Plaintiffs") hereby allege as follows:

1. Intervenors are individuals and shareholders of ConnectU, Inc., a Defendant in this Action. None of the Intervenors were parties to this case at the time Facebook filed its Confidential Motion to enforce a purported settlement agreement, each of them having been dimissed from the case for lack of personal jurisdiction, and Facebook did not serve the motion on Intervenors.

2. Plaintiff The Facebook, Inc. ("Facebook") is corporation organized under the laws of Delaware. Plaintiff Mark Zuckerberg is an individual. Zuckerberg is the CEO of Facebook.

3. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1367 and 28 U.S.C. § 1331 as this Third-Party Complaint arises in part under the Securities Exchange Act of 1934. Venue is proper pursuant to 28 U.S.C. § 1391 in that a substantial part of the events or omissions giving rise to Intervenor's claims occurred in this District.

4. On February 22, 2008, the parties entered into mediation in an attempt to resolve federal and state law claims at issue in the underlying litigation, as well as contract, fraud, copyright infringement and other claims brought by ConnectU against Facebook in the District of Massachusetts.

5. The mediation produced a 1½-page, handwritten document titled "Term Sheet & Settlement Agreement" (the "Term Sheet"), which is incorporated herein by reference and which stated in part: "All ConnectU stock in exchange

for [REDACTED][1/] cash & [REDACTED] common shares in Facebook." The Term Sheet also stated: "Facebook represents that it currently has [REDACTED] fully diluted shares [of common stock] outstanding."

6. The Intervenors executed the Term Sheet in the early hours of February 23, 2008. A fourth ConnectU shareholder, Howard Winklevoss, did not sign the Term Sheet.

7. Intervenors understood that the number of Facebook shares set forth in the Term Sheet was based on a recent public press release by Facebook which stated that the company was valued at approximately $15 billion. Based on that valuation and the number of outstanding shares represented by Facebook in the Term Sheet, Facebook common stock was worth approximately [REDACTED] per share. At that price, the value of [REDACTED] shares was [REDACTED], which when added to the [REDACTED] in cash, equaled [REDACTED], as described in the Second Declaration of Cameron Winklevoss dated June 18, 2008, which is incorporated herein by reference.

8. In the weeks following the mediation, the parties, through their counsel, attempted to negotiate a merger agreement that would accomplish the goals set forth in the Term Sheet. An attorney at Fenwick & West LLP ("Fenwick") representing Facebook, informed ConnectU (through its counsel) for the first time that Facebook's Board of Directors had, for purposes of compliance with Section 409A of the Internal Revenue Code and pursuant to a report by an independent appraisal firm, set the fair market value of Facebook common stock at [REDACTED] or only approximately one-quarter of the [REDACTED] value

---

1/ Certain items have been redacted from this Third Party Complaint in accordance with the Court's treatment of other public filings in this Action. Intervenors are prepared to furnish unredacted versions of this pleading to the Court and to Plaintiffs.

derived by dividing Facebook's publicly-disclosed $15 billion valuation by the number of outstanding shares set forth in the Term Sheet.

9. Around March 28, 2008, ConnectU's counsel asked to reallocate the merger consideration to provide more cash and less stock, using the [REDACTED] value derived from Facebook's publicly-disclosed $15 billion valuation. [REDACTED].

10. Based on Facebook's fair market valuation of [REDACTED] per share which was not disclosed to Intervenors, the stock portion of the consideration set forth in the Term Sheet was worth approximately one-quarter of the value it would be worth if the stock were valued in accordance with Facebook's public valuation.

11. Facebook said nothing prior to the mediation to change or to correct its publicly disclosed $15 billion valuation or the [REDACTED] per share value derived therefrom, nor did it disclose that its Board of Directors had established [REDACTED] as the fair market value pursuant to the Internal Revenue Code. As a company that was trading in its own stock, Facebook was a corporate insider that must abide by the "disclose or abstain" rule.[2/] Facebook violated that rule here.

12. By making affirmative statements publicly and in the Term Sheet, Facebook undertook a duty to speak fully and truthfully in connection with those subjects.

2/ *See, e.g., McCormick v. Fund Am. Cos*., 26 F.3d 869, 876 (9th Cir. 1994) (*citing* VII Louis Loss & Joel Seligman, *Securities Regulation* 1505 (3d ed. 1991) ("When the issuer itself wants to buy or sell its own securities, it has a choice: desist or disclose"); and Ricahrd Jennings & Harold Marsh, *Securities Regulation*, 1044 n. 12 (6th ed. 1987) ("the issuer itself is, of course, also covered" by insider trading laws.)

13. What Facebook knew at the mediation but failed to disclose (and ConnectU did not learn until well after the mediation had ended) was the material fact that Facebook's Board of Directors, in reliance on an independent appraisal expert, had determined that its common stock had a fair market value of only approximately one-quarter of the value derived from Facebook's $15 billion public valuation.

14. Upon information and belief, both Facebook's CEO (and member of the Board of Directors) Mark Zuckerberg and Facebook's Chief Financial Officer, Gideon Yu, knew of the Board of Directors' fair market value determination based on an independent appraisal. Zuckerberg is a member of Facebook's Board of Directors who obtained the independent appraisal. Both Zuckerberg and Yu attended the mediation and Zuckerberg signed the Term Sheet.

15. Facebook violated its duty by failing to disclose the Facebook Board's official valuation of the company's common stock, which was a material fact not known to Intervenors at the mediation and was necessary to make Facebook's prior public press release of a $15 billion valuation not misleading, and to satisfy the duty of an inside trader to "disclose or abstain."

16. Facebook had a duty to disclose the Board's [REDACTED] fair market value for Facebook common stock.

17. Facebook's material omissions led to execution of the Term Sheet and defrauded ConnectU out of a significant amount of consideration.

18. The Term Sheet is also missing material terms necessary to render it a complete, enforceable contract.

19. The material terms not contained in the Term Sheet include the structure of the transaction (merger or stock acquisition); the consideration offered and how it will be paid; the representations and warranties in general

form that the parties will be required to make; any material conditions to the closing of the transaction; and termination provisions.

20. The complex set of documents (totaling over 100 pages) that Facebook initially proferred as "required" to enforce the alleged agreement between the parties are strong additional proof of the ambiguity and incompleteness of the Term Sheet.

COUNT I:

DECLARATORY JUDGMENT

21. Intervenors restate and reallege the allegations set forth in Paragraphs 1 through 20 as if set forth fully herein.

22. An actual, substantial, immediate, and real controversy exists between the parties regarding the enforceability of the Term Sheet.

23. Intervenors seek a declaration that the Term Sheet is void and unenforceable because it fails to include terms that are material to a transaction of the sort at issue here and is therefore an incomplete agreement.

COUNT II:

FRAUD UNDER SECURITIES EXCHANGE ACT OF 1934

24. Intervenors restate and reallege the allegations set forth in Paragraphs 1 through 23 as if set forth fully herein.

25. At the time of the mediation, Facebook's public press release had proclaimed that the company was valued at $15 billion. By disclosing facts in connection with the negotiation of the Term Sheet, which was a securities transaction, Facebook assumed a duty to speak fully and truthfully on those subjects.

26. Facebook said nothing prior to the mediation to change or correct that publicly disclosed $15 billion valuation.

27. Facebook and Zuckerberg, as CEO and a member of the Board of Directors, were aware that the company was not valued at $15 billion but was, in fact, valued by its Board of Directors based on an independent appraisal at approximately one-quarter of that amount.

28. [REDACTED]

29. The value of the Facebook stock and resulting number of shares needed to equate to [REDACTED] in value which was to be exchanged as consideration pursuant to the Term Sheet was a material term of the Term Sheet.

30. Facebook and Zuckerberg's statements and omissions were made in connection with a purchase or sale of a security.

31. Under Section 29(b) of the Securities Act of 1934, Plaintiffs' fraud renders the Term Sheet void and unenforceable.

COUNT III:

FRAUD UNDER SECTION 25401 OF THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968

32. Intervenors restate and reallege the allegations set forth in Paragraphs 1 through 31 as if set forth fully herein.

33. [REDACTED].

34. As a result, Intervenors would lose a significant amount of value if they were to receive only the number of common stock shares set forth in the Term Sheet.

COUNT IV:

RESCISSION

35. Intervenors restate and reallege the allegations set forth in Paragraphs 1 through 34 as if set forth fully herein.

36. The Term Sheet is void an unenforceable because it was obtained through Facebook's fraud in violation of federal and state securities laws.

37. Intervenors are entitled to rescission under Section 29(b) of the Securities Exchange Act, Section 25501 of the California Corporate Securities Law of 1968, and California Civil Code § 1689.

RELIEF SOUGHT

WHEREFORE, The Intervenors demand relief as follows:

(i) Rescission of the Term Sheet;

(ii) A declaration that the Term Sheet is void and unenforceable; and

(iii) Such other and further relief as the Court may deem just and appropriate.

DATED: July 31, 2008

Respectfully submitted,
BYRNE & NIXON, LLP

By: /s/ Mark A. Byrne
Mark A. Byrne

O'SHEA PARTNERS LLP

By: /s/ Sean F. O'Shea (*admitted pro hac vice*)
Sean F. O'Shea

Attorneys for Intervenors and Third Party Plaintiffs CAMERON WINKLEVOSS, TYLER WINKLEVOSS and DIVYA NARENDA

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is **800 West Sixth Street, Suite 430, Los Angeles, California 90017**.

I have caused the service of **THIRD PARTY COMPLAINT AGAINST THE FACEBOOK, INC. AND MARK ZUCKERBERG REDACTED** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notified the following:

Chester Wren-Ming Day (cday@orrick.com)
D. Michael Underhill (munderhill@bsfllp.com)
David A. Barrett (dbarrett@bsfllp.com)
Evan A. Parke (eparke@bsfllp.com)
George C. Fisher (georgecfisher@gmail.com)
George Hopkins Guy (hopguy@orrick.com)
I. Neel Chatterjee (nchatterjee@orrick.com)
Jonathan M. Shaw (jshaw@bsfllp.com)
Kalama M. Lui-Kawn (klui-kwan@fenwick.com)
Monte M.F. Cooper (mcooper@orrick.com)
Rachel E. Matteo-Boehm (rachel.matteo-boehm@hro.com)
Roger Rex Myers (roger.myers@hro.com)
Scott Richard Mosko (scott.mosko@finnegan.com)
Sean Alan Lincoln (slincoln@orrick.com)
Steven Christopher Holtzman (sholtzman@bsfllp.com)
Theresa Ann Sutton (tsutton@orrick.com)
Tyler Alexander Baker (tbaker@fenwick.com)
Valerie Margo Wagner (valerie.wagner@dechert.com)
Yvonne Penas Greer (ygreer@orrick.com)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **July 31, 2008**, at Los Angeles, California.

/s/ Leticia Rosales (lettyrosales@byrnenixon.com)
Leticia Rosales